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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MICHAEL SIMMONS,

Defendant and Appellant.

A141928

(Sonoma County  
Super. Ct. No. SCR-637906)

Joseph Michael Simmons pleaded guilty, pursuant to a plea agreement, to assaulting a police officer and committing battery against another officer. Although the People urged the court to sentence Simmons to state prison and the Probation Department recommended against probation, the court suspended execution of a state prison sentence and granted Simmons probation, conditioned on serving one year in jail, successfully completing a drug rehabilitation program at the Jericho Project (Jericho), not leaving Jericho without the prior written permission of his probation officer and contacting his probation officer within 48 hours of leaving Jericho. The court also imposed a restitution fine of \$308 and a probation revocation restitution fine in the same amount.

Jericho discharged Simmons from its program after two weeks due to behavior it regarded as disruptive. Simmons failed to contact his probation officer within 48 hours. The People sought revocation of Simmons's probation based on his failure to successfully complete Jericho's program and failure to contact his probation officer within 48 hours of leaving Jericho. The trial court revoked Simmons's probation, executed the previously suspended sentence, vacated the previously imposed fines and

imposed a restitution fine of \$4,480 and a parole revocation restitution fine in the same amount.

Simmons contends that (1) the evidence does not show that he committed a willful violation of probation; (2) the court abused its discretion by not reinstating probation; and (3) the court was not authorized to increase the fines from \$308 to \$4,480. We find no merit in Simmons's first two arguments. The People agree with Simmons's challenge to the increase in fines and we concur. Accordingly, we order that the fines be reduced, but otherwise affirm the judgment.

## **BACKGROUND**

### **I.**

#### ***Procedural Background***

On August 20, 2013, the People filed an amended complaint<sup>1</sup> charging Simmons and co-defendant Korynn Rachelle Stewart with six counts:<sup>2</sup> (1) assault on a peace officer by means likely to produce great bodily injury (Pen. Code, § 245, subd. (c)),<sup>3</sup> accompanied by the allegation that Simmons inflicted great bodily injury on the victim (§ 12022.7, subd. (a)); (2 & 3) battery against a peace officer (§ 243, subd. (c)(2)); (4) resisting a police officer, causing serious bodily injury (§ 148.10, subd. (a)); and (5 & 6) misdemeanor resisting a police officer (§ 148, subd. (a)(1)).

On September 3, 2013, pursuant to a plea agreement, Simmons pleaded guilty to counts 1 and 3 and admitted the section 12022.7, subdivision(a) allegation. The court dismissed the remaining counts, as provided in the plea agreement.

Prior to sentencing, the People submitted a statement in aggravation, requesting that the court impose a state prison sentence and deny probation. The Probation Department's presentence report also recommended that probation be denied.

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<sup>1</sup> The original complaint was filed on July 30, 2013.

<sup>2</sup> The complaint charged Stewart alone with three additional counts.

<sup>3</sup> Further statutory citations are to the Penal Code, unless indicated otherwise.

On December 18, 2013, the trial court imposed a sentence of seven years, eight months: four years for count 1, plus three years for the section 1202.7, subdivision (a) allegation, plus eight months for count 3. The court suspended execution of the sentence and placed Simmons on probation for five years. Probation was conditioned on serving one year in county jail and successful completion of residential treatment for drug rehabilitation at Jericho. Simmons was directed not to leave Jericho without the prior written consent of the program director and his probation officer. The court also directed Simmons to report to his probation officer within two working days of his release from treatment. The court imposed a restitution fine (§ 1202.4) of \$308 and a probation revocation restitution fine (§ 1202.44) in the same amount.

On February 13, 2014, the trial court revoked Simmons' probation and issued a warrant for his arrest after the People alleged that Simmons had violated probation by failing to complete treatment at Jericho and by failing to contact the Probation Department after leaving Jericho.

On February 21, 2014, Simmons denied the probation violation, and the trial court remanded Simmons into custody.

On May 12, 2014, the trial court conducted a contested probation violation hearing. At the conclusion of the hearing, the court found that Simmons had violated probation. The court then executed the previously suspended sentence of seven years, eight months in state prison. The court vacated the previously imposed fines and fees and imposed a restitution fine of \$4,480 and a parole revocation restitution fine (§ 1202.45, subd. (a)) in the same amount.

Simmons timely filed a notice of appeal on May 19, 2014.

## II.

### *Factual Background*

#### **A. The Underlying Offense<sup>4</sup>**

On July 27, 2013, at about 10:10 p.m., Santa Rosa Police Officer Brandon Matthies stopped and detained Stewart for driving while intoxicated. Simmons, then 32 years old, was a passenger in Stewart's vehicle. Officer Mary Lou Hernandez arrived to assist Officer Matthies.

Simmons exited Stewart's vehicle and asked why Stewart was being placed under arrest. Simmons was agitated, appeared to be intoxicated and advanced toward the officers, who ordered him to return to the vehicle. Simmons did not comply and continued to advance. Officer Matthies attempted to handcuff Simmons, but Simmons pulled away and began to walk toward Stewart, who was already handcuffed.

Officer Matthies grabbed Simmons's arm, and Simmons began to fight, swinging his arms uncontrollably, yelling and making threats. Matthies took Simmons to the ground, and Simmons tried to push Matthies off. Matthies struck Simmons in the face several times, but Simmons only became more agitated. During the struggle, Matthies heard Officer Hernandez struggling with Stewart.

Simmons continued trying to push Officer Matthies off with his hands at the officer's waist. Matthies believed that Simmons was attempting to reach his firearm, so he pushed Simmons away from him and threw him against his patrol vehicle. Matthies took hold of his baton, but Simmons ran toward Officer Hernandez. As Simmons ran, Matthies hit him in the leg with his baton, which flew from his hand.

Officer Hernandez was in a kneeling position struggling with Stewart. Simmons ran up to Hernandez and kicked her in the face. Hernandez fell to her side, and Officer Matthies grabbed Simmons again and took him to the ground. Matthies again struck Simmons several times in the face. Hernandez began to assist Matthies, and she had her

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<sup>4</sup> The facts of the underlying offense are taken from the sentencing hearing testimony of the police officers involved.

baton out. Stewart had regained her feet and was trying to kick the officers. Matthies discharged his Taser at Stewart, who fell to the ground. Simmons continued to fight with the two officers. Matthies took Hernandez's baton and struck Simmons in the shoulder. Additional officers then arrived and took control of Simmons.

Officer Matthies suffered an abrasion and contusions to his forehead and injuries to his hands. Officer Hernandez suffered orbital fractures around her left eye and a flap from recent Lasik surgery had to be removed and replaced. She also had scrapes and abrasions to her knees and internal injuries to the knee area. At the time Simmons was sentenced, Officer Hernandez was on medical leave and had surgery scheduled to repair her knee. She had been told not to expect to return to work for six to twelve months.

Prior to the charged offense, Simmons had been convicted of two misdemeanors: (1) driving under the influence of alcohol (Veh. Code, § 23152, subd. (b)) on August 5, 2008; and (2) possession of marijuana (Health & Saf. Code, § 11357, subd. (c)) on September 3, 2013.

## **B. The Probation Violation<sup>5</sup>**

Jericho is a year-long residential drug and alcohol recovery program. Before Simmons was released from custody for treatment at Jericho, Deputy Probation Officer Tina Ornell sent him a letter informing him that she and Tricia Murphy were his probation officers. The letter also informed Simmons that he was required to immediately report to them upon leaving Jericho and that he should expect to be returned to custody.

Simmons entered Jericho on January 27, 2014. Jericho Director Damon Casparian testified that the next day Simmons announced to his "newcomer's group" he did not have a problem with drugs, alcohol or criminality and had no idea why he was in the program.<sup>6</sup> On February 1, 2014, Casparian sent Simmons a form letter stating that

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<sup>5</sup> Facts concerning the probation violation are taken from testimony given at the probation violation hearing.

<sup>6</sup> At the probation revocation hearing, Simmons denied ever saying that he did not have a problem with alcohol.

Simmons was only meeting the minimum requirements of the program. Casparian said that the letter is sent “when a guy is just basically going through the motions.”

At a “community meeting” on February 9, 2014, Simmons “raised his hand and expressed the fact that he didn’t relate to anything that was discussed and quite aggressively that night.” Simmons was asked to calm himself, “and at that point Mr. Simmons’[s] body language and facial expressions were . . . just clear that he didn’t want to continue participating in the program.”

Casparian testified that Simmons’s participation in the program was disruptive and distracted the other men in the group. Accordingly, Simmons was discharged from the program at about 8:00 p.m. on February 9, 2014. Simmons was transported to the Daly City BART station and was provided sufficient funds to return to Sonoma County. Simmons was not in possession of his personal belongings, including the letter that Ornell had sent him.<sup>7</sup>

Instead of returning to Sonoma County, Simmons went to San Francisco. He borrowed a telephone, called his aunt, and told her what had happened. Simmons’s aunt came to pick him up and told him that a cousin thought he might be able to be admitted to another rehabilitation program. Eddie Bridgett, program director of Henry Ohloff House (Ohloff), received a call at about 11:00 p.m. on February 9, 2014, inquiring if Simmons would be able to enter the Ohloff program.

At about 11:30 a.m. on February 10, 2014, Bridgett met with Simmons. Simmons told Bridgett that it was important for him to “g[e]t in touch with probation to let them know where he was” but did not tell Bridgett he was required to contact the Probation Department within two days of his discharge from Jericho. Bridgett told Simmons that he would call the Public Defender’s office and the Probation Department to find out who his probation officer was and to see if he would be permitted to participate in the Ohloff

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<sup>7</sup> Jericho clients sign a form stating their understanding that upon discharge their personal belongings will be held for 72 hours and they must call a contact number to make arrangements to pick up their belongings.

program. Bridgett made calls to the Public Defender's office and to a contact at the Probation Department, but received no responses that day.

Bridgett testified that on February 11, 2014, the Public Defender's office informed him it had no record of the names of Simmons's probation officers and there was a warrant for Simmons's arrest.<sup>8</sup> The Public Defender's office said it would arrange for Simmons's case to be on the court calendar for February 19 and requested that Bridgett bring Simmons to court on that date.

Bridgett heard back from his contact at the Probation Department on February 18, 2014, and learned the names of Simmons's probation officers. Bridgett took Simmons to court on February 19, 2014, and again on February 21, at which time Simmons was remanded into custody.

Simmons testified that at Jericho he "was doing [his] best the entire time." He was aware of the requirement that he contact his probation officers upon leaving Jericho. Although Simmons's aunt had a cell phone, Simmons did not use it to call the Probation Department before his arrival at Ohloff. He did not call the Probation Department while he was at Ohloff and before his meeting with Bridgett. Instead, he relied on Bridgett to contact the Probation Department on his behalf.

## **DISCUSSION**

Section 1203.2, subdivision (a), provides that a court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision." The standard of proof required for revocation of probation is a preponderance of evidence to support the violation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.) "[T]he evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982 (*Galvan*).) The term

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<sup>8</sup> Because the warrant was issued on February 13, 2014, Bridgett must have been mistaken about the date on which the Public Defender's office called him.

“willful” implies “that the person knows what he is doing, intends to do what he is doing, and is a free agent.” (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438.) “Once a probation violation occurs, the trial court has broad discretion in deciding whether to continue or revoke probation.” (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315.)

## I.

### ***Substantial Evidence Supports the Conclusion That Simmons Willfully Violated Probation Conditions.***

The trial court found Simmons in violation of his probation for two reasons: (1) “he left the program without the consent of his probation officer, not without the consent of the program because they kicked him out” and (2) “he did not contact probation as directed.” Simmons contends that the prosecution failed to prove that his violations of probation conditions were willful. We disagree—substantial evidence supports a conclusion that Simmons’s probation violations were willful.

#### **A. Substantial Evidence Supports a Conclusion That Simmons Willfully Failed to Obtain Consent to Leave Jericho.**

At sentencing, the trial court directed Simmons not to leave Jericho without the prior written consent of its director and his probation officer. It was uncontested that Simmons had not received such consent when Jericho dismissed him. However, Simmons argues that he had “no realistic opportunity to comply,” relying on *Galvan*.

In *Galvan*, Galvan had been ordered to report to his probation officer within 24 hours of his release from custody. (*Galvan, supra*, 155 Cal.App.4th at p. 981.) However, the federal government deported Galvan when he was released. (*Id.* at p. 983.) The *Galvan* court concluded: “Galvan’s immediate deportation to Mexico following his release from county jail demonstrates that his failure to report within 24 hours was not willful.” (*Id.* at p. 984.)

In contrast to *Galvan*, Simmons’s freedom of action was not restricted. There was no evidence that had Simmons wished to contact the Probation Department before Jericho took him to the BART station, he would have been unable to do so. Moreover, unlike Galvan, who had no control over his deportation, Simmons had control over his dismissal, which he could have prevented by participating in the program instead of



disrupting it. Only five days after entering Jericho, Simmons was told that he was only minimally meeting the program requirements. Casparian testified that “[n]umerous times” he advised Simmons to “close [his] mouth, listen in [the] groups and meetings and try to understand what’s happening here and how we’re trying to help you.” Instead, Simmons “continu[ed] to participate . . . disruptively and to distract the men, his fellow men in the group.” Casparian’s testimony supports the inference that Simmons could not reasonably have failed to understand that his behavior might lead to discharge from the program. However, Simmons made no effort to discuss with the Probation Department how he could avoid a violation should discharge occur. Substantial evidence supports a conclusion that the violation of probation was willful.

**B. Substantial Evidence Supports a Conclusion That Simmons Willfully Failed to Contact the Probation Department After Leaving Jericho.**

It is undisputed that Simmons failed to call the Probation Department or travel to its offices in Sonoma County within 48 hours of his discharge from Jericho. It is also undisputed that Simmons was aware of his obligation and that he had ample opportunity to fulfill it. The only excuse Simmons seems to offer is that he did not have the letter providing him the names of his probation officers and Bridgett told him that he would contact the Probation Department on Simmons’s behalf.

Simmons had no reason to believe (nor was evidence presented at the hearing) that had he called the Probation Department offices, he would not have been given the names of his probation officers.<sup>9</sup> Nor was it reasonable for Simmons to believe that Bridgett would fulfill his obligation because he never told Bridgett that he was required to contact

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<sup>9</sup> Simmons argues that “[t]he probation department’s failure to return Bridgett’s telephone call until more than a week after he left a message with the department on [Simmons’s] behalf was a circumstance beyond appellant’s control that demonstrates this was not a willful violation.” Bridgett called his “contact” at the Probation Department, someone named Kristy, and left a voice message on February 10, 2014. Kristy returned Bridgett’s call on February 18, 2014. This is not evidence that had Simmons personally called the Probation Department’s central office number and stated that he was required to contact his probation officers within the next two days he would not have timely been given his probation officers’ names and phone numbers.

his probation officers within 48 hours of his discharge from Jericho. It was also unreasonable for Simmons to assume that he could delegate his obligation to a non-attorney third party.

In short, substantial evidence supports the conclusion that Simmons willfully violated his probation by failing to contact the Probation Department within 48 hours of his discharge from the Jericho Project.<sup>10</sup>

## II.

### ***The Trial Court Did Not Abuse Its Discretion When It Did Not Reinstate Probation.***

Simmons first contends that the trial court abused its discretion because his probation violations were not willful. We have already rejected this argument.

Simmons next contends that the trial court abused its discretion because, as he describes himself, he is a good candidate for probation and made a good faith effort to comply with the conditions of probation. He stresses that prior to the underlying offense in this case his criminal history consisted of two substance abuse-related misdemeanors. Prior to his guilty pleas he wrote a letter of apology to the officers involved. The Probation Department presentencing report contained 10 letters of support from members of the community who attested to Simmons's kindness and generosity. He argues: "The charged incident was clearly out of character and appellant should have been permitted to continue and complete alcohol treatment at the Henry [Ohloff] House." He concludes: "[T]he evidence demonstrated that appellant was participating in treatment and that he was willing to continue. He had simply not been successfully treated in the two weeks that he attended the Jericho Project program."

At best, Simmons's argument goes to whether it would have been reasonable for the court to reinstate probation—it does not show that the court abused its discretion when it declined to do so. We bear in mind that " '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound

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<sup>10</sup> The trial court told Simmons: "[I]t is my firm belief that you were weaseling around trying to get yourself into another program so you wouldn't be facing probation's ire and mine as well."

discretion of the trial court.’ ” (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) In this case, the People sought a state prison sentence and the Probation Department recommended against probation. Although the court could have imposed sentence and committed Simmons to state prison, it recognized that Simmons had only two prior misdemeanor convictions and had been accepted to Jericho. As an act of clemency, the court suspended execution of Simmons’s prison sentence and placed him on probation. Nevertheless, the trial court was troubled by the seriousness of Simmons’s offence: “It’s hard to reconcile those letters [in the probation department presentence report] with the level of abnormality and violence that was exhibited that night. [¶] . . . [¶] It’s just incredibly distressing that someone that has the support in the community that you do can rise to this level of violence.” After granting probation, the court stated: “I would like the minutes to reflect that if there are any violations of probation that they will be sent to me no matter where I am, Department 2 or any department. [¶] Because if you come back on a violation of probation, even if it’s as minor as drinking alcohol, you’re going to go to prison, Mr. Simmons. That’s my promise to you; do you understand that?” Simmons replied that he understood.

At the probation revocation hearing, the court did exactly what it had warned Simmons it would do. Simmons came back before the court, having violated a condition of his probation, and the court imposed the previously suspended sentence—a sentence that it had been under no obligation to suspend. We find no abuse of discretion by the trial court.

### **III.**

#### ***The Trial Court Lacked Authority to Increase Restitution and Revocation Restitution Fines When It Revoked Probation.***

When the court sentenced Simmons, it imposed a restitution fine (§ 1202.4) of \$308 and a probation revocation restitution fine (§ 1202.44) in the same amount. When the court later revoked Simmons’s probation, it vacated the previously imposed fines and fees and then imposed a restitution fine of \$4,480 and a parole revocation restitution fine (§ 1202.45, subd. (a)) in the same amount. Simmons contends that there is no authority

for the court to increase these fines after revoking parole. The People concede that the trial court erred and we agree.

Section 1202.4 fines “may only be imposed once at the time of conviction, which was when the probation was initially granted.” (*People v. Perez* (2011) 195 Cal.App.4th 801, 805 [an increase of restitution fine from \$200 to \$600 at probation revocation is not authorized]; *People v. Johnson* (2003) 114 Cal.App.4th 284, 307 [court erred by increasing restitution fine from \$200 to \$800 at probation revocation].) Accordingly, the trial court was not authorized to increase Simmons’s restitution fine from \$308 to \$4,480.

Section 1202.45, subdivision (a), provides that a parole revocation restitution fine shall be imposed in the same amount as the section 1202.4 restitution fine. Accordingly, the parole revocation restitution fine may not exceed \$308, the amount of the lawfully imposed restitution fine.

Both of the fines in question must be reduced to \$308. The section 1202.45 parole revocation restitution fine, in the amount of \$308, is suspended unless parole is revoked.

#### **DISPOSITION**

The judgment is modified to (1) reinstate the \$308 restitution fine (from \$4,480) the court originally imposed under section 1202.4 and (2) reduce from \$4,480 to \$308 the parole revocation restitution fine imposed under section 1202.45. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the California Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

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STEWART, J.

We concur.

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RICHMAN, Acting P.J.

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MILLER, J.